

APPEAL NO. 990785

This appeal is brought pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on March 18, 1999. He made the following findings of fact and conclusions of law:

FINDINGS OF FACT

2. Between November 9 and December 17, 1998, the Claimant [respondent] worked for the Employer and operated a fork lift.
3. The Claimant was required to make repetitive hand and wrist movements in order to perform her job.
4. The Claimant was exposed to repetitious physically traumatic activities in the workplace.
5. The Claimant knew that she may have a work related occupational disease, repetitive trauma injury, on or about _____.
6. The Claimant was unable to work from December 17, 1998, through March 18, 1999, as a result of the compensable injury on _____.

CONCLUSIONS OF LAW

1. The Claimant sustained a compensable occupational disease, repetitive trauma injury, on _____.
2. The Claimant had disability from December 17, 1998, through March 18, 1999.

The appellant (carrier) requested review, stating that it appealed Findings of Fact Nos. 3, 4, 5, and 6 and Conclusions of Law Nos. 1 and 2; urged that the appealed determinations are contrary to the great weight of the evidence; contended that the hearing officer improperly transferred the burden of proof to it; and requested that the Appeals Panel reverse the decision of the hearing officer and render a decision that the claimant did not sustain an injury in the course and scope of her employment and that she did not have disability. A response from the claimant has not been received.

DECISION

We affirm.

The claimant testified that about the first of October 1998, she began working for a temporary agency and was assigned to perform duties at a distribution center of the employer; that she started unloading trucks and placing items of furniture on carts; that she became an "order picker"; that she was hired by the employer on November 9, 1998, and continued to work as an "order picker"; that in that position she drove a forklift and placed items that had been ordered on a cart that was moved by a forklift; that at times the lift was raised to a height of 60 feet; that the items she pulled for orders averaged weighing about 80 pounds; and that she developed pain and cramps in her right hand. She said that she learned that her condition was work related when she spoke with Mr. D, a coworker, on _____. The claimant stated that on that day she went to Mr. B, her supervisor; that she told him that she had sharp pain in her hand during the day and that her hand was cramping at work and at night; that Mr. B told her that it sounded like carpal tunnel syndrome, that she should put Icy Hot and heat on it, and that if it did not get better the employer would send her to a clinic; and that the problems started about 10 days before she told Mr. B about them. She testified that she was scheduled to work on Saturday, November 28, 1998; that she did not work that day and went to an emergency room; that she received a splint; and that she worked with a splint on Monday, November 30, 1998. She stated that she was scheduled to work on Saturday, December 12, 1998; that she was sick and did not work; that she was terminated on December 17, 1998; that she went to Dr. W on that day; and that Dr. W told her that the problems with her hand were caused by a combination of everything she did at work. The claimant said that she has been unable to work since December 17, 1998, because of those problems.

An emergency room note dated November 28, 1998, states that the claimant may return to work on November 29, 1998; that she must wear a wrist splint; that she should apply heat; and that she should follow up with Dr. W in seven to ten days. In a note dated December 17, 1998, Dr. W stated that the claimant worked on a forklift; that she lifts, pushes, and pulls furniture; that on about _____, she started having pain in the right wrist and that she also had right shoulder pain; and that she had "right shoulder strain and right wrist pain secondary either to strain/over use vs. carpal tunnel syndrome (CTS)." In a letter dated January 13, 1999, Dr. W repeated the previous diagnosis, recommended a referral to an orthopedist, and stated that, in her medical opinion based on the claimant's description of her duties at work, the time course of her symptoms, and the examination, it is medically probable that her condition resulted from her position at the employer. In an office visit note dated January 21, 1999, Dr. F stated that the claimant reported an onset of right wrist pain after working a forklift with repetitive use of knobs; that she lost her job, but continues to have pain; that the pain could be secondary to CTS; and that an EMG should be obtained to evaluate for possible CTS. The claimant testified that the EMG had not been approved and that she cannot afford to pay for an EMG. In a note dated February 17, 1999, Dr. W stated that the claimant should remain off work until Dr. F provides an orthopedic evaluation.

Mr. B testified that he supervised the claimant; that he agreed with the claimant's testimony about what she told him on _____; that on that day he asked the claimant if her condition was work related; and that she told him that she did not know. He stated that

the claimant was scheduled to work on November 28 and December 12, 1998; that she called on those days and advised someone working for the employer that she would not be working, and that she did not work on those Saturdays. Mr. B said that the general manager and the assistant general manager decided to terminate the claimant. Ms. H, the office manager for the employer, testified that on November 30, 1998, the claimant told her "I'm just telling you now it's bogus. I'm just letting y'all know this."

We first address the carrier's contention that the hearing officer transferred the burden to the carrier to prove that there was no injury and that the claimant did not have disability. During the hearing, the hearing officer did state to the attorney representing the carrier that the claimant had presented medical evidence and the carrier had not. While that comment and others made by the hearing officer may not have been advisable, the record does not indicate that he shifted the burden of proof to the carrier.

The burden is on the claimant to prove by a preponderance of the evidence that an injury occurred in the course and scope of employment, Texas Workers' Compensation Commission Appeal No. 91028, decided October 23, 1991, and that the claimant has disability, Texas Workers' Compensation Commission Appeal No. 93953, decided December 7, 1993. The hearing officer is the trier of fact and is the sole judge of the relevance and materiality of the evidence and of the weight and credibility to be given to the evidence. Section 410.165(a). The trier of fact may believe all, part, or none of any witness's testimony because the finder of fact judges the credibility of each and every witness, the weight to assign to each witness's testimony, and resolves conflicts and inconsistencies in the testimony. Taylor v. Lewis, 553 S.W.2d 153 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Texas Workers' Compensation Commission Appeal No. 93426, decided July 5, 1993. This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). An appeals level body is not a fact finder, and it does not normally pass upon the credibility of witnesses or substitute its own judgment for that of the trier of fact even if the evidence would support a different result. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied). That different factual determinations could have been made based upon the same evidence is not a sufficient basis to overturn factual determinations of a hearing officer. Texas Workers' Compensation Commission Appeal No. 94466, decided May 25, 1994. Only were we to conclude, which we do not in this case, that the appealed findings of fact and conclusions of law are so against the great weight and preponderance of the evidence as to be clearly wrong or unjust, would there be a sound basis to disturb those determinations. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986). Since we find the evidence sufficient to support the determinations of the hearing officer, we will not substitute our judgment for his. Texas Workers' Compensation Commission Appeal No. 94044, decided February 17, 1994.

We affirm the decision and order of the hearing officer.

Tommy W. Lueders
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

CONCUR IN RESULT:

Judy L. Stephens
Appeals Judge